

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

D. R. HORTON, INC.

and

Case 12-CA-25764

MICHAEL CUDA, an Individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel hereby files the following Exceptions to the Decision of Administrative Law Judge William N. Cates (the ALJ) issued on January 3, 2011, in the matter of *D.R. Horton, Inc.*, Case 12-CA-25764, reported at JD(ATL)-32-10. The Acting General Counsel submits that the ALJ properly found that D.R. Horton, Inc. (Respondent) violated Section 8(a)(4) and (1) of the Act by maintaining a mandatory arbitration provision that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board. (ALJD, p.5, L.24 to p.6, L.37).<sup>1</sup>

Counsel for the Acting General Counsel respectfully takes exceptions as enumerated below to the findings, conclusions and recommendations of the ALJ.

1. The ALJ failed to fully set forth the relevant provisions of Respondent's Mutual Arbitration Agreement, herein called the MAA, as follows:

Mutual Arbitration Agreement

As a condition of employment with D. R. Horton, Inc. or its subsidiaries or affiliates (collectively, the "Company"), and in order to avoid the burdens and delays associated with court actions, the undersigned employee ("Employee") and the Company voluntarily and knowingly enter into this Mutual Arbitration Agreement ("Agreement"):

1. Except as provided below, Employee and the Company, on behalf of their affiliates, successors, heirs, and assigns, agree that all disputes and claims between them, including those relating to Employee's employment with the Company and any separation therefrom, and including claims against the Company's affiliates, directors, employees, or agents, shall be determined exclusively by final and binding arbitration before a single, neutral arbitrator as described herein, and that judgment upon the arbitrator's award may be entered in any court of competent jurisdiction. Claims subject to arbitration under this Agreement include without limitation claims for discrimination or harassment; wages, benefits,

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<sup>1</sup> As used herein, ALJD-page and line number refers to the ALJ's Decision, and JX refers to a joint exhibit.

or other compensation; breach of any express or implied contract; violation of public policy; personal injury; and tort claims including defamation, fraud, and emotional distress. Except as expressly provided herein, the Company and Employee voluntarily waive all rights to trial in court before a judge or jury on all claims between them.

2. Disputes and actions excluded from this Agreement are: (a) claims by Employee for workers' compensation or unemployment benefits; (b) claims for benefits under a Company plan or program that provides its own process for dispute resolution; (c) claims by either party for declaratory or injunctive relief relating to a confidentiality, non-competition, or similar obligation (any such proceedings will be without prejudice to the parties' rights under this Agreement to obtain additional relief in arbitration with respect to such matters); and (d) actions to compel arbitration or to enforce or vacate an arbitrator's award under this Agreement, such action to be governed by the Federal Arbitration Act and the provisions of Section 8 of this Agreement. ....

By signing this Agreement, Employee acknowledges that he or she is knowingly and voluntarily waiving the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company as well as the right to resolve employment-related disputes in a proceeding before a judge or jury. Employee further acknowledges and agrees that this Agreement, while mutually binding upon the parties, does not constitute a guarantee of continued employment for any fixed period or under any particular terms, and does not alter in any way the at-will nature of Employee's employment relationship.

(ALJD p.2, L.23-38; JX-2).

2. The ALJ erred by failing to find that on January 3, 2008, Respondent counsel Tricarico sent an electronic mail message to Charging Party Michael Cuda's attorney Charles Scalise, then of Morgan and Morgan, attaching a copy of the MAA and stating, "Attached is the arbitration agreement. Everyone in the Company has executed the same agreement." (GCX-2; T – 21-24).

3. The ALJ erred by failing to find that Respondent violated Section 8(a)(1) of the Act because it required employees to execute its MAA and thereby conditioned their

employment on the waiver of the right to concertedly litigate employment claims. (ALJD p.4, L.1 – p.5, L.22; JX-2).

4. The ALJ erred by failing to find that the MAA is analogous to a “yellow dog” contract and, without more, violates Section 8(a)(1) of the Act. (ALJD p.4, L.1 – p.5, L.22; JX-2).

5. The ALJ erred by failing to find that the MAA is overbroad and violates Section 8(a)(1) of the Act because it could be read by a reasonable employee to prohibit him or her from engaging in protected Section 7 activity, i.e. from concertedly pursuing any covered employment claims on a class, collective or joint action basis in a state or federal court or other civil proceedings, and because it could be read by a reasonable employee to prohibit him or her from concertedly challenging the legality of the MAA itself in a tribunal outside of Respondent’s dispute resolution process. (ALJD p.4, L.1 – p.5, L.22; JX-2).

6. The ALJ erred by failing to find that the conduct of Charging Party Michael Cuda and his attorney in seeking class action relief only in Respondent’s arbitration procedures tends to confirm that a reasonable employee would read the MAA as barring concerted resort to the courts for class, collective or joint action relief. (ALJD p.4, L.1 – p.5, L.22; JX-2).

7. The ALJ erred by failing to recommend that the Board order Respondent to: cease and desist from engaging in the unlawful conduct described in GC Exceptions 3 through 6. (ALJD p.7, L.6-24).

8. The ALJ erred by failing to recommend that the Board order Respondent to cease and desist from maintaining **or enforcing** the MAA. (ALJD p.7, L.8-10).

9. The ALJ erred by failing to recommend that the Board order Respondent to take affirmative action by rescinding the MAAs that have been executed by its former and current employees. (ALJD p. 7, L.15-24).

10. The ALJ erred by failing to recommend that the Board order Respondent that if it revises the MAA, it is required to make clear to employees in the revised agreement: not only (i) that the revised agreement does not in any way bar or restrict their right to file charges with the Board (as the ALJ properly found), but also (ii) that the revised agreement is not intended to constitute a waiver of employees' collective rights under Section 7 of the Act to concertedly pursue any covered claim before a state or federal court on a class, collective or joint action basis; (iii) that Respondent recognizes the employees' right to concertedly challenge the validity of the forum waiver in the Agreement upon such grounds as may exist at law or in equity; and (iv) that no employee will be disciplined, discharged, or otherwise retaliated against for exercising his or her rights under Section 7 of the Act. (ALJD p. 7, L.1-24).

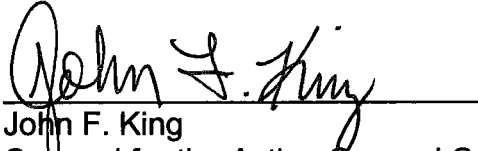
11. The ALJ erred by failing to recommend that Respondent be ordered to remedy its unfair labor practices on a corporate-wide basis. (ALJD p.7; JX-2; GCX-2; T – 21-24).

12. The ALJ erred by failing to include language in the recommended Notice to

Employees that is consistent with the remedies sought in GC Exceptions 7 through 10.  
(ALJD p.9).

Dated at Miami, Florida this 14<sup>th</sup> day of March, 2011

Respectfully submitted,

A handwritten signature in cursive script, reading "John F. King", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

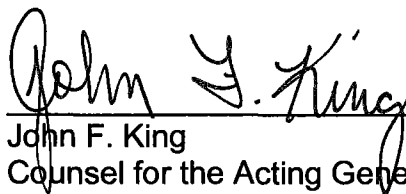
I hereby certify that the Acting General Counsel's Exceptions to the Administrative Law Judge's Decision was duly served upon the following individuals by electronic transmittal on March 14, 2011:

Hon. Lester Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14th Street, N.W.  
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(Electronically filed)

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